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Re: Revised Definition of Waters of the United States, Docket EPA-HQ-OW-2018-0149; RIN 2040-AF75

Dear Mr. McDavit and Ms. Moyer:

The American Cultural Resources Association (ACRA) appreciates the opportunity to comment on the Environmental Protection Agency (EPA) and the Department of the Army Corps of Engineers (Corps) proposed rule defining the scope of waters federally regulated under the Clean Water Act (CWA). ACRA is the national trade association supporting and promoting the common interests of cultural resource management firms. With the aim of delivering responsible solutions that balance development and preservation, our member firms undertake much of the legally mandated CRM studies and investigations in the United States.

In this letter ACRA provides substantive recommendations to improve historic preservation and permitting outcomes under this proposed rule. ACRA has great concerns regarding the way this rule restricts the definition of “waters of the United States” (WOTUS), does away with the “significant nexus” test, bases jurisdiction on arbitrary criteria rather than scientific analysis, and excludes features with major seasonal water flow from jurisdiction.

ACRA is a strong proponent of efficient environmental review to facilitate development while still protecting our shared cultural heritage. Our members are consultants who support project proponents and federal agencies to comply with various federal permitting processes, including historic and cultural resources review under Section 106 of the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA). ACRA firms work regularly on Corps-permitted projects and contributed comments during the 2014 rulemaking process that resulted in the WOTUS rule currently in force across the United States.

Most ACRA firms are small businesses that stand to be greatly affected by the exclusion of areas from the permit review underpinning the nation's historic preservation and environmental laws. Our firms play a crucial role in helping the federal government meet its obligations to the public in accordance with these laws, and arbitrarily removing areas from CWA permit review would mean the loss of jobs and economic revenue important to our industry. Moreover, it places in jeopardy the cultural heritage that so uniquely defines this nation.

This Rulemaking is a Considerable Undertaking and Should Allow for Additional Public Comment Time and More Stakeholder Outreach

ACRA asks that the EPA and Corps recognize the seriousness of this rulemaking by providing the public with an appropriate level of input. This rule seeks to supersede the 2015 WOTUS definition that was carefully-considered *just five years ago* and developed in conjunction with 207 days of public comment, extensive stakeholder outreach, and multiple public meetings. The resulting final rule was a product of the will of the people and of engaged stakeholder groups. If the EPA and Corps revise this rule, such revision should be done with the same or greater level of care as was initially employed in the rule's creation. Only sixty days of public comment and a single public comment meeting are far from adequate. We request an additional four public meetings, and the extension of the public comment period for an additional sixty days. We also note that other commenting organizations express concern regarding the rule's economic analysis, which appears to need greater time and critical review to fully express the economic implications of this rule.

This Rule Eliminates the Well-Developed Legal Concept of "Significant Nexus"

The definition of federal permit areas and undertakings are a major source of uncertainty, risk, and delay on projects, and the conflicting definitions of WOTUS has been a contributor to these challenges. When Congress elected to regulate WOTUS in the CWA, Congress did not define which water features fell within the jurisdiction of the Act. Instead, caselaw and agency guidance have developed the "significant nexus" test to determine which adjacent waters or wetlands are regulated. The EPA and Corps provided this test with considerable definition and regularity as part of the 2014 rulemaking. This well-established and developed test should remain largely in effect in order to increase project predictability and improve environmental and cultural review.

Initially described by Justice Kennedy in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), the significant nexus test determined jurisdiction by asking whether a non-navigable water feature sufficiently impacted a navigable waterway. Through rulemaking in 2014, the EPA and Corps built on this legal precedent and subsequent substantial scientific analysis to establish a common definition for "significant nexus" based on nine functions: sediment trapping; nutrient recycling;

pollutant trapping, transformation, filtering, and transport; retention and attenuation of floodwaters; runoff storage; contribution of flow; export of organic matter; export of food resources; and provision of life-cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, and use as a nursery area) for species located in traditional navigable waters.

Since human beings have always planned their habitations and their movements based on access to water, interpretations regarding federal permitting around waterways have some of the greatest impacts on America's cultural resources. The proposed rule ignores the well-developed "significant nexus" test in favor of definitions that emphasize a direct hydrological connection of "adjacent" waters and wetlands to jurisdictional waters. This decision will reduce the number of projects subject to environmental and cultural resources review, and therefore will result in the unmitigated destruction of historic and cultural sites. Furthermore, the untested emphasis on "direct hydrological connection" will also introduce new risks and uncertainties into the definition of permit areas, potentially resulting in more project delays or litigation. Instead, this proposed rule should retain and further clarify the "significant nexus" test that permits a more nuanced approach to protecting the hydrological, geomorphological, and geographic conditions influencing a navigable water and its tributaries.

Jurisdiction Should Be Based on Scientific Evidence

Regardless of whether the agencies retain the "significant nexus" test, the concepts and criteria for determining jurisdiction should be based on the current and best available science of hydrological connectivity. The proposed rule establishes arbitrary criteria that are not clearly relevant to determining potential environmental impacts on navigable waters. As previously discussed, arbitrary and capricious changes to permitting risks destruction of significant cultural resources associated with WOTUS, and also exposes agencies and projects to additional conflict and legal action.

For example, under the proposed rule, wetlands proximate to a WOTUS would only be considered "adjacent" waters if they have a "direct hydrological surface connection" to the WOTUS (i.e., water flows from the wetland to the jurisdictional feature or are connected via perennial or intermittent flow or the jurisdictional water periodically inundates the wetland). However, scientific evidence often shows connectivity without direct surface connection, and this new rule is not consistent with caselaw that has established that discharges to hydrologically-connected groundwater create liabilities under the CWA. Likewise, the 2015 rule includes adjacent waters if they are within certain areas of the 100-year floodplain of an eligible waterway and under similar circumstances.

The question of the hydrological connections that exist between water features and wetlands or ground water is scientifically complex, and one that the 408-page report titled *Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific*

Evidence addressed comprehensively as part of the 2014 rulemaking process. This report indicates that adjacent waters (ground or surface) located within a 100-year floodplain of a jurisdictional water will very likely connect hydrologically to the jurisdictional water even in the absence of an obvious surface flow connection. Ignoring these data on environmental impacts of hydrological connection risks the unknowing destruction of important cultural resources and also increases the likelihood that permit areas would be challenged by consulting parties or federally-recognized tribes, introducing uncertainty and delays.

Rather than creating a new set of criteria, the agencies should use this Connectivity Report and established legal precedents to ensure that any redefinition of WOTUS is based upon hydrological science.

The Proposed Rule Inappropriately Excludes Major Seasonal Streams That Have Considerable Environmental Impact and Contain Sensitive Cultural Resources

The agencies seek comment on whether the definition of tributary should “include streams that contribute less than intermittent flow to a traditional navigable water or territorial sea in a typical year.” The proposed rule excludes features that flow only in response to precipitation or groundwater from the WOTUS definition. This exclusion will preclude many substantial water features, particularly western arroyos and similar features. These features are in arid physiological zones and served as highly significant sources of water for prehistoric and historic communities, and their archaeological sensitivity is correspondingly very high. As a result, ACRA strongly recommends that this definition be expanded to include rivers and streams with less than intermittent seasonal flow due to precipitation or groundwater. Furthermore, we oppose a minimum specific duration of continuous flow for a feature to contain ‘intermittent’ flow for the same reason.

In addition, the agencies propose to capriciously define WOTUS, because the seasonality of many of these streams is a temporary, human-created condition. The manner in which this rule limits jurisdictional waters to those with specific flow characteristics precludes consideration of the impact of human activity on natural river flow. For example, the Santa Cruz River in Arizona and New Mexico is now generally a dry riverbed unless the area receives significant rainfall. It was a permanent river until its flow was greatly reduced by water use by the city of Tucson. This use lowered the water table within living memory – the Santa Cruz was a permanent river as recently as 1940. The historic and prehistoric cultural sites along the Santa Cruz are of the magnitude that one would expect along a substantial waterway through an arid region. Accordingly, the federal government should not redefine its permit areas in a manner that arbitrarily excludes them from agency responsibilities under NHPA and NEPA.

Regardless of the proportion of the year that these seasonal rivers flow, they have considerable environmental impacts on federal waters. However, this proposed rule excludes them from federal review based on arbitrary criteria regarding the source and

persistence of river flow. These criteria are poor indicators of river sensitivity for environmental impacts and historic resources and, given contemporary shifts in water use and climate, they will only become poorer.

Indeed, past humans frequently visited and used seasonal tributaries throughout the west, which created dense concentrations of archaeological and cultural resources of significance to tribes and communities across the region. Many of these are nationally or internationally significant. In western areas with a drier climate, native archaeological sites like village habitations and agricultural centers are commonly located along seasonal water sources, including rivers that were seasonal even during prehistoric times. For many important archaeological sites located in intermittently dry river beds across the country, federal oversight of 404 permits under the CWA is the only mechanism available to identify and protect these sites and artifacts.

The proposed tributary definition does nothing but exclude federal protection for a large number of western rivers with considerable environmental and historic significance. This tributary definition should be made more expansive rather than restricted.

If a Historic Ditch is Currently in a Tributary, it Should be Considered a WOTUS

This rule proposes to include a historic ditch under the WOTUS definition only if it was constructed in a water that met the definition of a tributary at the time it was built and that water continues to meet the definition of a tributary. The agencies propose to use a variety of tools to determine whether a tributary or wetland was present at the time of ditch construction, including “historic topographic maps, historic aerial photographs, local and state records and surface water management plans, agricultural records, street maintenance data, precipitation records, historic permitting and jurisdictional determination records, certain hydro geomorphological or soil indicators, wetlands and conservation programs and plans, and functional assessments and monitoring efforts.” The agencies especially requested comment on the role of these sources in determining whether a ditch was located in a tributary and more generally what constitutes evidence regarding whether a ditch was constructed in a tributary. ACRA opposes this test and arduous analysis, and instead recommends considering a historic ditch a WOTUS if it is currently in a water that meets the definition of a tributary.

The proposed test creates a needlessly exclusionary standard in which a ditch in a tributary, whose effluent impacts the water quality of a WOTUS, might be excluded from federal review simply because it was not a tributary at some point in the past. Given that the CWA seeks to regulate water quality in navigable waters, a project’s potential to create environmental impacts, persistent or periodic, should be at the heart of definitions and standards. Accordingly, if a ditch is currently in a tributary, it should be considered a WOTUS.

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The American Cultural Resources Association believes that development, preservation, and environmental values can be balanced as Congress intended when implementing the CWA. Judicious and consistent definitions of WOTUS can facilitate responsible development, environmental protection, cultural and historic preservation, and local community input on federal undertakings. ACRA reiterates our request that the Corps and EPA refrain from reducing CWA jurisdiction and extend public comment to discuss this important rule.

Thank you for the opportunity to comment. Please do not hesitate to contact us with any questions on these comments.

Best regards,

A handwritten signature in black ink, appearing to read "Kim Redman", with a long horizontal flourish extending to the right.

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